PD-0059-20
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 3/31/2020 2:43 PM
Accepted 3/31/2020 3:20 PM
DEANA WILLIAMSON
CLERK

No. PD-0059-20

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
3/31/2020
DEANA WILLIAMSON, CLERK

JAMES BERKELEY HARBIN, II, Appellant

v.

THE STATE OF TEXAS Appellee

Appeal from Dallas County
No. 05-18-00098-CR

* * * * *

# STATE'S BRIEF ON THE MERITS

* * * * *

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## IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant, James Berkeley Harbin, II.

* The trial judge was the Honorable Tammy Kemp, 204th Criminal District Court, Dallas County.

* Counsel for the State at trial were Jorge Solis and Trey Stock, Frank Crowley Courts Building, 133 N. Riverfront Boulevard, LB-19, Dallas, Texas 75207.

* Counsel for the State on appeal was Marisa Elmore, Frank Crowley Courts Building, 133 N. Riverfront Boulevard, LB-19, Dallas, Texas 75207.

* Counsel for the State before the Court of Criminal Appeals is Stacey M. Soule, State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

* Counsel for Appellant throughout the entire case has been was Lawrence B. Mitchell, 11300 N. Central Expressway, Suite 408, Dallas, Texas 75243.

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**STATE'S BRIEF ON THE MERITS**

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The Legislature's enactment of an offense and punishment is an absolute requirement that must be applied irrespective of the parties' or judiciary's wishes. Contrary to the Dallas Court of Appeals' holding, the 1994 murder-offense sudden-passion jury instruction, applicable only to offenses committed post-September 1, 1994, cannot be applied to Appellant's punishment retrial for a murder he committed

in 1991.

## STATEMENT REGARDING ORAL ARGUMENT

The Court did not grant oral argument. As the SPA urged in her PDR, this is a simple statute-applicability issue that can be resolved by a summary reversal.

## STATEMENT OF THE CASE

In 1992, the Dallas Court of Appeals affirmed Appellant's murder conviction and life sentence. *Harbin v. State*, No. 05-91-00621-CR, 1992 WL 186257, at *10 (Tex. App.—Dallas Aug. 6, 1992, pet. ref'd) (not designated for publication).

In 2015, this Court granted habeas relief in the form of a new punishment hearing. *Ex parte Harbin*, WR-82,672-01, 2015 WL 3540861, at *1 (Tex. Crim. App. June 3, 2015) (not designated for publication). In doing so, the Court emphasized that the jury's verdict on "guilt remains unaltered." *Id*.

A jury re-sentenced Appellant to 24 years' imprisonment in 2017. 1 CR 178. On appeal, Appellant claimed that the trial court erred to deny his requested sudden-passion-mitigation instruction. *See* Appellant's Court of Appeals' Brief at 7-12.[1] The court of appeals agreed; it concluded that the 1994 punishment-phase sudden passion

[1] Available at: http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=7bfcc602-210e-4844-acb1-cb359945aa59&coa=coa05&DT=Brief&MediaID=eafd6356-16b5-4ac4-88b0-0115a00c5589.

issue applied, and held that the error was harmful. *Harbin v. State*, No. 05-18-00098-CR, 2019 WL 5884404, at *6-7 (Tex. App.—Dallas Nov. 12, 2019) (not designated for publication).

## ISSUE PRESENTED

**Is a summary reversal warranted when the lower court violated an absolute requirement by applying law not applicable to the case, *i.e.* the punishment-phase sudden passion issue, not in effect until 1994, to a first-degree murder committed in 1991?**

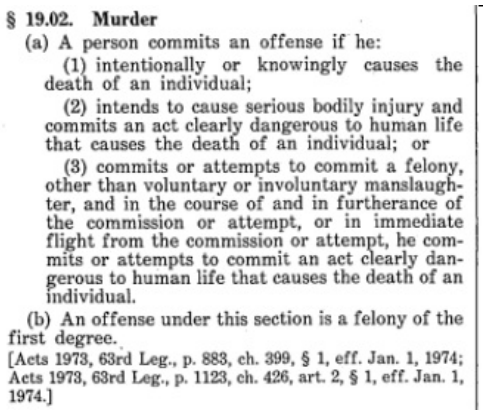
## SUMMARY OF THE ARGUMENT

The 1994 murder-offense punishment-phase-sudden-passion instruction is not the law applicable to the murder Appellant committed in 1991. In 1991, sudden passion was included in the lesser-offense voluntary manslaughter statute as a guilt-phase issue. On September 1, 1994, the Legislature eliminated voluntary manslaughter and made sudden passion a punishment-phase issue in the murder statute. The savings clause plainly provided that an offense committed before 1994 remained covered by the law in effect when the offense was committed. Offense effective dates are non-optional, systemic requirements. The Dallas court therefore erred to hold that the 1994 punishment-sudden-passion issue was applicable to Appellant's punishment retrial. Appellant's sentence should be affirmed.

## ARGUMENT

### I. Background: History of Sudden Passion.

Appellant committed the offense of murder in January 1991. 1 CR 18 (indictment), 19 (arrest). The indictment alleged that he knowingly and intentionally caused the death of his father by shooting him with a firearm. 1 CR 18. At the time of the offense, the charged offense of murder was defined in TEX. PENAL CODE § 19.02(a)(1) and was categorized as a first-degree felony.



§ 19.02. Murder

(a) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual;

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

(3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

(b) An offense under this section is a felony of the first degree.

[Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974; Acts 1973, 63rd Leg., p. 1123, ch. 426, art. 2, § 1, eff. Jan. 1, 1974.]

A lesser-included offense, depending on the facts, was voluntary manslaughter in TEX. PENAL CODE § 19.04; it was a second-degree felony. *Moore v. State*, 969 S.W.2d 4, 9-10 (Tex. Crim. App. 1998). It provided that a person commits voluntary manslaughter if he commits the offense of murder in Section 19.02 under the immediate influence of sudden passion arising out of adequate cause. TEX. PENAL CODE § 19.04.

§ 19.04. Voluntary Manslaughter

(a) A person commits an offense if he causes the death of an individual under circumstances that would constitute murder under Section 19.02 of this code, except that he caused the death under the immediate influence of sudden passion arising from an adequate cause.

(b) "Sudden passion" means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation.

(c) "Adequate cause" means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.

(d) An offense under this section is a felony of the second degree.

[Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974; Acts 1973, 63rd Leg., p. 1123, ch. 426, art. 2, § 1, eff. Jan. 1, 1974.]

Sudden passion, therefore, at the time of the 1991 offense, was a guilt-phase issue enumerated as a separate, lesser-included offense.[2]

Effective in 1994, the Legislature eliminated the offense of voluntary manslaughter and made sudden passion a punishment-phase issue under murder. TEX. PENAL CODE § 19.02(a), (d); Acts 1993, 73rd Leg., ch. 900 (S.B. 1067), § 1.01, eff. Sept. 1, 1994.

Sec. 19.02. MURDER. (a) *In this section:*

*(1) "Adequate cause" means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.*

*(2) "Sudden passion" means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation.*

*(b)* A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual;

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

(3) commits or attempts to commit a felony, other than [~~voluntary or involuntary~~] manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

*(c) Except as provided by Subsection (d), an* [~~(b) An~~] offense under this section is a felony of the first degree.

*(d) At the punishment stage of a trial, the defendant may raise the issue as to whether he caused the death under the immediate influence of sudden passion arising from an adequate cause. If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree.*

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[2] Appellant's first jury was given this as a lesser included offense at his murder trial. The jury rejected it as a basis for finding Appellant guilty. 1 CR 34 (jury verdict form).

## II. Court of Appeals' Decision Applying the Wrong Statute.

The Dallas court held that Appellant was improperly denied the 1994 punishment-phase-sudden-passion instruction that was not in effect at the time of the 1991 offense. *Harbin*, 2019 WL 5884404, at *5-6. Though the court acknowledged the changes in the law between the time of the offense and 1994, it rationalized the application of the 1994 law to Appellant's 2017 retrial, stating:

> The reasons he was granted a new punishment hearing were based on the exclusion of evidence the writ courts concluded would have been mitigating. Those courts, and appellant's able writ counsel, were certainly aware that Texas law currently makes such mitigation a punishment issue. The writ trial court recommended, and the court of criminal appeals granted, a new punishment hearing so that the mitigating evidence could be produced to a jury. We are confident that those bodies intended to provide appellant a vehicle wherein the wrong he had suffered could be remedied. Fine distinctions of 'procedural' and 'substantive' changes to the law must yield to the protections of the Fourteenth Amendment.

*Id*. at *6.

## III. Analysis: The Law in Effect at the Time of the Offense Controls.

### 1. Simply put, the court of appeals applied the wrong statute.

"A newly enacted statute, when it becomes effective, is presumed to be prospective unless it is expressly made retrospective." *Pesch v. State*, 524 S.W.2d 299, 301 (Tex. Crim. App. 1975). Therefore, as a rule of thumb, the law defining an offense and its punishment range in effect at the time the offense was committed is the law applicable to the case. *See Buntion v. State*, 482 S.W.3d 58, 105 (Tex. Crim. App. 2016) (life-with-parole instruction at defendant's 2011 punishment retrial not applicable to offense committed in 1990); *Ex parte Hawkins*, 722 S.W.2d 424, 425-26 (Tex. Crim. App. 1986) (indictment charging an offense not in effect at the time the conduct took place did not charge an offense); *Pesch*, 524 S.W.2d at 300 (insanity defense, defined in the new 1974 Penal Code effective January 1, 1974, did not apply to the murder offense committed in August 1973). As a result, as this Court has stated, "It sometimes happens that defendants are sentenced to more or less severe punishment for the same conduct based on the date on which the offense is committed." *Ex parte Ervin*, 187 S.W.3d 386, 388 (Tex. Crim. App. 2005).

The legislative branch has the exclusive authority to define what an offense is as a matter of Texas law and, toward that end, it used that power to eliminate sudden-passion voluntary manslaughter as an independent, stand-alone offense.

*Mays v. State*, 318 S.W.3d 368, 387-88 (Tex. Crim. App. 2010); *Wesbrook v. State*, 29 S.W.3d 103, 113 n.7 (Tex. Crim. App. 2000) ("For those murders committed after August 31, 1994, a defendant could attempt to prove the issue of sudden passion by a preponderance of the evidence only at the punishment stage of trial."). Relatedly, it created and defined a defensive issue within the murder statute by adding sudden passion as a mitigation element. Those concurrent acts were prospective only. The savings clause dictated that the changes apply only to an offense committed on or after the effective date; an offense committed before September 1, 1994 remained covered by the law in effect when the offense was committed.[3]

Effective dates for penal offenses and applicable punishments[4] are absolute, systemic requirements that are not optional with the parties (and thus cannot be waived or forfeited) and constitute a directive to be implemented by the judiciary.[5]

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[3] Acts 1993, 73rd Leg., ch. 900 (S.B. 1067), §§ 1.18-1.19, pp. 3705, 3766, eff. Sept. 1, 1994.

[4] *Compare with Lankston v. State*, 827 S.W.2d 907, 908 (Tex. Crim. App. 1992) ("most evidentiary rules[] are really optional with the parties"); *Simpson v. State*, 991 S.W.2d 798, 800 (Tex. Crim. App. 1998) (discussing *Lankston* and stating, "A holding that the effective dates of evidentiary statutes are unwaivable would be contrary to the very nature of evidentiary error.").

[5] Though waiver and forfeiture are helpful in defining systemic rights and requirements, they are not a controlling principle here because Appellant requested the inapplicable instruction and the trial court denied it. A trial court can never err by denying the inclusion of an inapplicable instruction.

*See Williams v. State*, 273 S.W.3d 200, 221 (Tex. Crim. App. 2008) ("A defendant cannot waive submission of an element of the prosecution's case to the finder of fact."); *Smith v. State*, 74 S.W.3d 868, 874 (Tex. Crim. App. 2001) ("the inclusion of the deliberateness special issue is a directive of the trial court and not a right of the parties; it may not be waived by the litigants.") (citing *Powell v. State*, 897 S.W.2d 307, 315-18 (Tex. Crim. App. 1994) (plurality), *overruled in part by Prystash v. State*, 3 S.W.3d 522 (Tex. Crim. App. 1999) (party can be estopped from complaining about unauthorized submission that he procured)); *Morris v. State*, 280 S.W.2d 255, 255 (Tex. Crim. App. 1955) (vacating first-offender DWI conviction with no jail term because the statute in effect at the time the offense was committed required a jail term). Therefore, the court of appeals' distinction between procedural and substantive changes is irrelevant; absolutely no substantive-procedural dichotomy exists in this context.[6] *See Moore*, 969 S.W.2d at 9-10 (issue of whether sudden passion was a lesser included offense of capital murder continued to "linger[]" for offenses committed before September 1, 1994); *see also Mims v. State*, 3 S.W.3d 923, 926 (Tex. Crim. App. 1999) ("from 1974 until 1994, there existed a separate offense

[6] The court of appeals appears to have invoked the Ex Post Facto Clause, *see Harbin*, 2019 WL 5884404, at *5-6, but that is not an issue here because there is no retroactive application of any statute by the Legislature and he is being punished according to the law annexed to the crime at the time it was committed.

of 'voluntary manslaughter'—an offense which could be 'attempted' under the Penal Code."). Applying the 1994 punishment-sudden-passion instruction to Appellant's 1991 murder offense, as the lower court did, is irreconcilable as a matter of black-letter law.[7]

### 2. Direct appeal from the punishment retrial is not an opportunity to provide habeas relief in excess of that already granted by this Court.

The Dallas court's decision cannot be justified as a (further) remedy for Appellant's successful habeas complaints. Appellant sought relief in the form of a new punishment hearing, arguing that the State failed to disclose exculpatory evidence and that his trial counsel failed to present mitigating evidence. 1 CR 83 (habeas findings and conclusions). He received the relief he asked for and was entitled to, and this Court expressly held that his first-degree conviction for murder stands. *Ex parte Harbin*, 2015 WL 3540861, at *1. This resolution is binding in all related future cases. *See State v. Swearingen*, 478 S.W.3d 716, 720 (Tex. Crim. App. 2015) (under the law-of-the-case doctrine, an appellate court's prior resolution of a legal question is binding in subsequent appeals involving the same issue). The court

[7] Nor is there a generally applicable non-statutory sudden passion instruction. *Mays*, 318 S.W.3d at 388 ("There is no free-floating, non-statutory, common-law right to an instruction on sudden passion[.]").

of appeals, a forum without 11.07 habeas jurisdiction,[8] cannot usurp this Court's final habeas jurisdiction by undoing or circumventing its prior decision or by retroactively granting greater relief than the law permits.

### 3. Separation of powers is violated when the judiciary creates an offense or punishment.

Likewise, courts cannot alter the offense level or punishment assigned by the Legislature by mixing and matching various statutes that were in effect at different times.[9] And if condoned, the lower court's decision would provide an opportunity for a future jury to set aside the first-degree offense level by reducing it to a second degree at punishment. This means that it authorizes the jettisoning of a former jury's guilty verdict by supplanting it with a conviction for an offense—second-degree murder—that did not exist when Appellant shot his father. Constructing a new offense most certainly invades the power assigned to the Legislature; the court of appeals' ruling therefore violates separation-of-powers. *See Vandyke v. State*, 538 S.W.3d 561, 573 (Tex. Crim. App. 2017) (it is the Legislature's prerogative to make, alter, and repeal laws and to "define criminal offenses [and] fix punishment for those

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[8] TEX. CODE CRIM. PROC. art. 11.07 § 3(a) (relief from final felony conviction and sentence returnable to this Court).

[9] *But see Ex parte Maxwell*, 424 S.W.3d 66, 75 (Tex. Crim. App. 2014) (remanding for jury's consideration of life with parole after *Miller v. Alabama*, 567 U.S. 460 (2012), declared life without parole for juveniles to be cruel and unusual).

offenses."). The constitutional imperative of separation of powers is not a "fine distinction" involving procedural or substantive law to be disregarded out of any perceived interest of fairness. *See Harbin*, 2019 WL 5884404, at *6 ("Fine distinctions of 'procedural' and 'substantive' changes to the law must yield to the protections of the Fourteenth Amendment.").

**4. Forfeiture is not an issue.**

The State's failure to urge the effective date argument before rehearing in the court of appeals does not matter.[10] As discussed above, statutes defining an offense and applicable punishment, based on their effective dates, are the law applicable to the case. This is a basic principle of criminal law, so much so that any true controversy over the matter rarely surfaces—if ever; usually the application of a statute not in effect at the relevant time results from an unintentional mistake or misunderstanding by the parties and/or the trial court and is not a deliberate attempt to circumvent the law, as it has been in this case.

Regardless of the nature of the right here, the State was not required to file a response brief in the lower court and therefore could not have forfeited any claim

[10] *See* Appellant's Reply to the State's PDR (arguing forfeiture), available at http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=d8cdd673-d234-47f1-b372-e8cf261b60da&coa=coscca&DT=BRIEF&MediaID=8f6a1ca5-1ffa-4c66-8f52-bfb1676d74e2.

about the applicable statute. *See McClintock v. State*, 444 S.W.3d 15, 20 (Tex. Crim. App. 2014) ("the State, as the prevailing party at trial, need not raise a particular argument in favor of the trial court's ruling in a reply brief on appeal as a predicate to later raising it in a discretionary review context."); *Rhodes v. State*, 240 S.W.3d 882, 886, n.9 (Tex. Crim. App. 2007) ("the party who wins at the trial level who complains about a decision of the court of appeals need only address the holding of the court of appeals."). Also, the State's complaint is the result of the lower court's application of improper law; the Dallas court's decision is the impetus for the State's mandatory controlling-statute argument. *See McClintock*, 444 S.W.3d at 20 (there is no default when the State asks this Court on PDR to address a ground "essentially generated by the lower appellate court's particular manner of disposing of the claim on appeal."). Forfeiture is a non-issue.

### 5. Conclusion: Appellant's sentence was properly assessed according to the law in effect when he murdered his father in 1991.

In sum, the 1994 punishment-phase-sudden-passion instruction is not the law applicable to Appellant's case. Giving such an instruction would be erroneous. Appellant's sentence should be affirmed.[11]

[11] Appellant did not raise any other points of error in the court of appeals.

## PRAYER FOR RELIEF

The State prays that the Court of Criminal Appeals reverse the court of appeals' decision and affirm the jury's sentence.

Respectfully submitted,

*/s/ Stacey M. Soule*
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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 2,160, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

*/s/ Stacey M. Soule*
State Prosecuting Attorney

## CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State's Brief has been served on March 31, 2020, via email or certified electronic service provider to:

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judge.mitchell@gmail.com

*/s/ Stacey M. Soule*
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